BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Modifying the Commission's Process to Avert	)	
Harm to U.S. Competition and U.S. Customers	)	IB Docket No. 05-254
Caused by Anticompetitive Conduct	)	
	)	

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby submits its reply to the comments filed pursuant to the Notice of Inquiry released by the Commission in the above-captioned proceeding ("*Notice*").[1] Sprint submits that the record of this proceeding supports the initiation of a rulemaking to craft rules for immediate interim relief in the event of circuit-blocking by foreign carriers exercising market power, or circuit-blocking initiated at the behest of a foreign government to coerce a settlement rate increase.[2]

I. THE COMMISSION SHOULD FOCUS IN THIS PROCEEDING ON INTERIM RELIEF PROCEDURES FOR FUTURE INSTANCES OF CIRCUIT DISRUPTION, NOT ON THE MERITS OF CASES INVOLVING PAST INSTANCES.

The Commission's goal in this proceeding and in a subsequent rulemaking should be to set in place rules and procedures that will reduce the level of confidence on the part of foreign carriers and governments that non-negotiable rate increase demands can be successfully

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[1] Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct, *Notice of Inquir*y, IB Docket No. 05-254, FCC 05-152 (released Aug. 15, 2005) ("*Notice*").

[2] *See* Comments of AT&T (filed Oct. 7, 2005); Comments of MCI (filed Oct. 7, 2005); Comments of the Jamaica Competitive Telecommunications Association and Reliant Enterprise Communications Ltd. (filed Oct. 7, 2005); Comments of the Malaysian Communications and Multimedia Commission (filed Oct. 7, 2005).

implemented through a "domino strategy" that rewards U.S. carriers that immediately accede to such demands with increased market share by blocking calls carried by U.S. carriers that have not acceded by a prescribed deadline. Past episodes of circuit disruption merely illustrate the problem to be addressed.

Despite the fact that the *Notice* focused on prospective situations involving circuit-blocking, several parties have reacted defensively to references to past circuit disruption, specifically that in Jamaica.[3] Sprint does not believe that the Commission need resolve in this proceeding the merits of the circuit-blocking which took place in Jamaica in June of this year. Rather, Sprint contends that if appropriate procedures for interim relief had been in place at that time, the circuit disruption which took place could have been avoided. Indeed, the Jamaican authorities that prescribed circuit-blocking as the means to enforce the international termination rate increase would have had to consider the effect of an across-the-board stop-payment order issued to U.S. carriers, and a proceeding on the merits before the Commission before that stop-payment order would have been lifted. Moreover, if the proposal Sprint made in its initial comments were to have been adopted prior to this episode,[4] the responsible Jamaican authorities also would have had to consider whether selective circuit-blocking, as part of an effort to whipsaw U.S. carriers into signing settlement agreements with the increased rate levels, would

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[3] Comments of the Jamaican Ministry of Commerce, Science and Technology (filed Oct. 7, 2005); Comments of Cable & Wireless Jamaica Limited (filed Oct. 7, 2005); Comments of Digicel (filed Oct. 7, 2005). In addition, the Caribbean Association of National Telecommunications Organizations ("CANTO"), of which Jamaica is a member, filed comments that opposed any of the responses to coercive circuit-blocking suggested by the *Notice*, albeit without specific reference to the circuit disruption in Jamaica.

[4] Comments of Sprint Nextel Corporation at 3-6 (filed Oct.7, 2005) (proposing a "no-payment" penalty if a Commission decision on the merits determines that foreign carriers have blocked circuits as part of a pattern of coercive, anticompetitive conduct).

have resulted in a significant loss of termination payments revenue for the period that the circuit-blocking was in effect.

At a minimum, these remedies – had they been in place – may have motivated the Jamaican authorities to announce beforehand their intentions to enforce the rate increase through disruption of circuits, and not to break off the diplomatic communications that were initiated by the U.S. Government to resolve the issues surrounding the circuit disruption. Either of these opportunities may have led to constructive dialog that could have averted or curtailed the circuit disruption and ultimately addressed, in a mutually satisfactory way, the issue of financing Jamaica's universal service program through increased charges for termination of in-bound international calls. Instead, perhaps relying on the knowledge that players in the highly competitive U.S. international services market would seize an opportunity to take market share from competitors unable to terminate calls in Jamaica, the Jamaican authorities pursued a different approach: they ordered the blocking of circuits of those international carriers that had not signed agreements by midnight June 1.

The Jamaican circuit-blocking episode is instructive in that, within three days after the blocking of AT&T, MCI and Sprint ensued at the June 1 deadline, traffic from the United States to Jamaica had returned to 75 to 80 percent of normal levels. At that time, and because of concerns raised by large business customers with needs for switched service connectivity to Jamaica – needs that could be met by carriers whose circuits remained open – Sprint gave in and signed, under protest, settlement agreements with C&W Jamaica and Digicel containing the increased termination rates. This rapid scenario demonstrates that any interim relief regime that the Commission may establish must provide for an immediate remedy. The passage of several days allowing for public notice, pleadings and replies, and a considered, explanatory decision

will place any such relief outside of a meaningful time frame. Sprint believes that a whipsawing strategy will succeed while such a proceeding remains pending and the outcome uncertain.

While adversarial procedures are appropriate for an initial decision on the merits, and could be expedited so that a stop-payment order would create minimal burdens for foreign carriers if a whipsawing complaint were to be ruled without merit,[5] the only effective interim remedy for circuit disruption, once it has been implemented or is imminent, precludes such procedures. As Sprint explained in its initial comments, carriers facing circuit disruption within the context of a pattern of anticompetitive conduct should be able to obtain immediate injunctive relief on an *ex parte* basis, with a sworn or documented evidentiary showing. The gravity of such an undertaking and the sought-after remedy – a directive from the Commission ordering all U.S. carriers to cease payments to the blocking foreign carrier – will minimize the possibility of abuse. The Commission also has the option of sanctions if abuses were to occur.[6]

Without immediate interim relief procedures in place, other foreign governments and foreign carriers unilaterally seeking non-negotiable rate increases will be encouraged to follow a strategy that works. Whether this strategy is termed "whipsawing" or the enforcement of "legitimate government policies," the result will be further circuit disruption and higher charges for U.S. consumers, plus distortion in the marketplace as market shares change based not on

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[5] As settlements are generally rendered up to 60 days from the time period of the settled traffic, a concomitant proceeding on the merits would have little effect on payments were the whipsawing complaint ruled defective.

[6] In addition to the general sanctions authority that the Commission possesses for violations of its rules, *see* 47 U.S.C. § 502, the Commission could place the rules for applications for interim relief in Subpart H of Part 1 of Title 47 C.F.R., entitled "Ex Parte Communications." Violations of the provisions of that subpart can result in disqualification from further participation in the proceeding. 47 C.F.R. §1.1216. Such a sanction would foreclose permanent relief for a carrier that made false or misleading statements in order to gain interim relief on an *ex parte* basis.

competitiveness but on U.S. carriers' relative willingness to have termination rates dictated to them under threat of call-blocking.

II. THE COMMISSION SHOULD NOT BE DETERRED BY THE ARGUMENTS MADE BY PARTIES OPPOSED TO A RULEMAKING TO ESTABLISH INTERIM RELIEF PROCEDURES IN RESPONSE TO CALL-BLOCKING COMPLAINTS.

Sprint does not believe that the Commission need examine in detail all the potential merits or deficiencies of yet-unfiled whipsawing complaints before it initiates a rulemaking to establish procedures for interim relief in such cases. Sprint therefore does not here respond to all the possible justifications for rate increases and call-blocking that have been offered in the comments, which essentially urge the Commission to do nothing to combat circuit disruptions of the type documented in the *Notice*.[7] Difficult policy issues, such as that presented by the Jamaica universal service plan, can be addressed on a case-by-case basis in decisions on the merits. Those policy issues must be distinguished, however, from the tactics of whipsawing and circuit disruption used to obtain a coercive rate increase. The Commission has sufficient experience with anticompetitive conduct to be able to discern the likelihood of its presence in a particular call-blocking situation. What the Commission does not currently possess are rules that will enable it to address such anticompetitive conduct in an effective manner. This deficiency can be remedied through an appropriate rulemaking.

Sprint rejects the argument that the interim relief contemplated in the *Notice* could be utilized as an "offensive" weapon to give U.S. carriers an "unfair advantage" in commercial negotiations.[8] In its dealings with foreign carriers, Sprint has been willing to negotiate with

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[7] *See*, *e.g.*, Comments of CANTO at 7-9 (filed Oct. 7, 2005).

[8] *See id.* at 6.

those carriers seeking rate increases based on cost considerations, government policies, or competitive circumstances. Such negotiations are severely skewed when a threat of call-blocking is introduced. The episodes of call-blocking documented in the *Notice* derived from "take it or leave it" tactics adopted by foreign carriers and governments that capitalize on the competition among U.S. carriers and that can be documented through correspondence or testimony. In the unlikely event that a U.S. carrier attempted to gain an "unfair advantage" in commercial negotiations by touting the availability of FCC interim relief aimed at countering whipsawing and call-blocking, this conduct could be similarly documented. Sprint fails to see how such a tactic could present a reasonable possibility of success in a commercial negotiation.

Finally, Sprint must once again reject the notion that it is engaged in profiteering by allegedly not passing through the benefits of termination rate decreases to its customers.[9] Such arguments appear to be premised on the notion that the only costs borne by an international carrier are those for transit and termination, and overlook the costs of marketing, customer acquisition and retention, bad debt, fraud and the like. Moreover, the international services market in the United States is complex – there are many different prices and products for making calls to international destinations. An average collection rate does not begin to capture the complexity of this marketplace. While it is true that a residential or business subscriber without an international calling plan who makes a call to Jamaica, for example, will incur a per-minute charge that is much higher than the termination rate for that call, a purchaser of a particular Sprint pre-paid card can make calls to a landline telephone in Jamaica for 7 cents a minute, with a 50 cent connection charge.[10] Other Sprint pre-paid cards offer rates as low as 10 cents a

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[9] *See id.* at 11.

[10] The Sprint/Dollar Phone International Surcharge Prepaid Phone Card.

minute, without a connection charge. The complexity of the market in the United States for international calling offers no justification for termination rate increases or circuit disruption.

III. CONCLUSION

For the reasons given above, the Commission should initiate a rulemaking to establish procedures for immediate injunctive relief for U.S. carriers subjected to whipsawing tactics by foreign carriers or governments, including circuit disruption or the threat of circuit disruption, and to promulgate a rule establishing a mechanism under which the Commission can order U.S. carriers not to compensate foreign carriers during a period when such carriers block the circuits of any U.S. carrier as part of a whipsawing strategy.

Respectfully submitted,

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